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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 Louis Boehm,

10 Plaintiff,

11 v.

12 Commissioner of Social Security
13 Administration,

14 Defendant.

No. CV-22-00561-PHX-DWL

ORDER

15 Plaintiff Louis Joseph Boehm challenges the denial of his application for benefits
16 under the Social Security Act (“the Act”) by the Commissioner of the Social Security
17 Administration (“Commissioner”). The Court has reviewed Plaintiff’s opening brief (Doc.
18 10), the Commissioner’s answering brief (Doc. 11), and Plaintiff’s reply (Doc. 12), as well
19 as the Administrative Record (“AR”), and now affirms the Administrative Law Judge’s
20 (“ALJ”) decision.

21 **I. Procedural History**

22 On February 12, 2019, Plaintiff filed an application for disability and disability
23 insurance benefits, alleging disability beginning on November 26, 2018. (AR at 13.) The
24 Social Security Administration (“SSA”) denied Plaintiff’s application at the initial and
25 reconsideration levels of administrative review and Plaintiff requested a hearing before an
26 ALJ. (*Id.*) On March 2, 2022, following a hearing, the ALJ issued an unfavorable decision.
27 (*Id.* at 10-24.) The Appeals Council later denied review, and the ALJ’s decision became
28 the final. (*Id.* at 1-6.)

II. The Sequential Evaluation Process and Judicial Review

To determine whether a claimant is disabled for purposes of the Act, the ALJ follows a five-step process. 20 C.F.R. § 404.1520(a). The claimant bears the burden of proof on the first four steps, but the burden shifts to the Commissioner at step five. *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). At the first step, the ALJ determines whether the claimant is presently engaging in substantial gainful activity. 20 C.F.R. § 404.1520(a)(4)(i). At step two, the ALJ determines whether the claimant has a “severe” medically determinable physical or mental impairment. 20 C.F.R. § 404.1520(a)(4)(ii). At step three, the ALJ considers whether the claimant’s impairment or combination of impairments meets or medically equals an impairment listed in Appendix 1 to Subpart P of 20 C.F.R. Part 404. 20 C.F.R. § 404.1520(a)(4)(iii). If so, the claimant is automatically found to be disabled. *Id.* At step four, the ALJ assesses the claimant’s residual functional capacity (“RFC”) and determines whether the claimant is still capable of performing past relevant work. 20 C.F.R. § 404.1520(a)(4)(iv). If not, the ALJ proceeds to the fifth and final step, where she determines whether the claimant can perform any other work in the national economy based on the claimant’s RFC, age, education, and work experience. 20 C.F.R. § 404.1520(a)(4)(v). If not, the claimant is disabled. *Id.*

An ALJ’s factual findings “shall be conclusive if supported by substantial evidence.” *Biestek v. Berryhill*, 139 S. Ct. 1148, 1153 (2019). The Court may set aside the Commissioner’s disability determination only if it is not supported by substantial evidence or is based on legal error. *Orn v. Astrue*, 495 F.3d 625, 630 (9th Cir. 2007). Substantial evidence is relevant evidence that a reasonable person might accept as adequate to support a conclusion considering the record as a whole. *Id.* Generally, “[w]here the evidence is susceptible to more than one rational interpretation, one of which supports the ALJ’s decision, the ALJ’s conclusion must be upheld.” *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002) (citations omitted). In determining whether to reverse an ALJ’s decision, the district court reviews only those issues raised by the party challenging the decision. *Lewis v. Apfel*, 236 F.3d 503, 517 n.13 (9th Cir. 2001).

1 III. The ALJ's Decision

2 At step one, the ALJ found that Plaintiff had not engaged in substantial, gainful
 3 work activity since the alleged onset date. (AR at 15.) At step two, the ALJ determined
 4 that Plaintiff has following medically determinable impairments: Burkitt's lymphoma,
 5 pancytopenia, neuropathy, hyperlipidemia, hypothyroidism, obesity, shingles, and sciatica.
 6 (*Id.*) However, the ALJ also determined that those medically determinable impairments
 7 were not severe under the meaning of the Act. (*Id.* at 15-19.) In reaching this
 8 determination, the ALJ evaluated Plaintiff's symptom testimony, concluding that
 9 Plaintiff's "statements concerning the intensity, persistence and limiting effects of [his]
 10 symptoms are not entirely consistent for the reasons explained in this decision." (*Id.* at
 11 17.) The ALJ also evaluated opinion evidence from various medical sources, concluding
 12 as follows: (1) Sumeet Mendonca, M.D., treating provider ("unpersuasive" or "less
 13 persuasive"); (2) J. Fahlberg, M.D., state agency consultant ("persuasive"); and (3) K.
 14 Shelman, M.D., state agency consultant ("persuasive"). (*Id.* at 18-19.) Finally, the ALJ
 15 "considered the third party function reports completed by the claimant's family and friends,
 16 Ann Boehm, Mary Davis, Barbara Bettlack, and Susan Graham, . . . [but found] that they
 17 do not warrant a modification to this decision." (*Id.* at 19.) Thus, the ALJ concluded that
 18 Plaintiff is not disabled. (*Id.* at 19.)

19 IV. Discussion

20 Plaintiff presents three issues on appeal: (1) whether the ALJ erred when
 21 characterizing the severity of his impairments at step two; (2) whether the ALJ erred when
 22 analyzing Dr. Mendonca's opinions; and (3) whether the ALJ erred when discrediting his
 23 symptom testimony. (Doc. 10 at 1.) As a remedy, Plaintiff seeks a remand for calculation
 24 of benefits pursuant to the credit-as-true rule. (*Id.* at 15.)

25 Below, the Court begins by addressing Plaintiff's challenges to the evaluation of the
 26 medical opinion evidence and his symptom testimony, because the resolution of the other
 27 challenge on appeal—Plaintiff's challenge to the ALJ's step-two severity evaluation—
 28 turns in part on the resolution of his other challenges.

1 **A. The ALJ’s Evaluation Of Dr. Mendonca’s Medical Opinions**

2 1. Standard Of Review

3 In January 2017, the SSA amended the regulations concerning the evaluation of
4 medical opinion evidence. *See Revisions to Rules Regarding Evaluation of Medical*
5 *Evidence*, 82 Fed. Reg. 5844 (Jan. 18, 2017). The new regulations apply to applications
6 filed on or after March 27, 2017, and are therefore applicable here. The new regulations
7 provide in relevant part as follows:

8 We will not defer or give any specific evidentiary weight, including
9 controlling weight, to any medical opinion(s) or prior administrative medical
10 finding(s), including those from your medical sources The most
11 important factors we consider when we evaluate the persuasiveness of
12 medical opinions and prior administrative medical findings are supportability
13 . . . and consistency

14 20 C.F.R. § 416.920c(a).¹ Regarding the “supportability” factor, the new regulations
15 explain that the “more relevant the objective medical evidence and supporting explanations
16 presented by a medical source are to support his or her medical opinion(s), . . . the more
17 persuasive the medical opinions . . . will be.” *Id.* § 404.1520c(c)(1). Regarding the
18 “consistency” factor, the “more consistent a medical opinion(s) . . . is with the evidence
19 from other medical sources and nonmedical sources in the claim, the more persuasive the
20 medical opinion(s) . . . will be.” *Id.* § 404.1520c(c)(2)

21 Recently, the Ninth Circuit confirmed that the “recent changes to the Social Security
22 Administration’s regulations displace our longstanding case law requiring an ALJ to
23 provide ‘specific and legitimate’ reasons for rejecting an examining doctor’s opinion.”
24 *Woods v. Kijakazi*, 32 F.4th 785, 787 (9th Cir. 2022). Thus, “the former hierarchy of
25 medical opinions—in which we assign presumptive weight based on the extent of the
26 doctor’s relationship with the claimant—no longer applies. Now, an ALJ’s decision,
including the decision to discredit any medical opinion, must simply be supported by

27 ¹ Other factors that may be considered by the ALJ in addition to supportability and
28 consistency include the provider’s relationship with the claimant, the length of the
treatment relationship, the frequency of examinations, the purpose and extent of the
treatment relationship, and the specialization of the provider. 20 C.F.R. § 416.920c(c).

1 substantial evidence.” *Id.* With that said, “[e]ven under the new regulations, an ALJ cannot
2 reject an examining or treating doctor’s opinion as unsupported or inconsistent without
3 providing an explanation supported by substantial evidence. The agency must articulate
4 how persuasive it finds all of the medical opinions from each doctor or other source and
5 explain how it considered the supportability and consistency factors in reaching these
6 findings.” *Id.* at 792 (cleaned up). Although an “ALJ can still consider the length and
7 purpose of the treatment relationship, the frequency of examinations, the kinds and extent
8 of examinations that the medical source has performed or ordered from specialists, and
9 whether the medical source has examined the claimant or merely reviewed the claimant’s
10 records . . . the ALJ no longer needs to make specific findings regarding these relationship
11 factors” *Id.*

12 2. Dr. Mendonca’s Opinions

13 Plaintiff’s treating oncologist, Dr. Sumeet Mendonca, submitted two medical source
14 statements regarding Plaintiff’s condition. (AR at 1405-10, 1500-04.) In an October 2019
15 statement, Dr. Mendonca noted that Plaintiff’s Burkitt’s lymphoma was stable as of the last
16 evaluation, although Plaintiff still required monitoring. (*Id.* at 1406.) Dr. Mendonca also
17 stated that Plaintiff experienced bone and joint pain, fatigue, and neuropathy. (*Id.*) Dr.
18 Mendonca indicated that Plaintiff’s fatigue, neuropathy, and deficient focus were side
19 effects of his medication. (*Id.*) Dr. Mendonca also found that Plaintiff could walk a quarter
20 mile before needing to rest or experiencing severe pain; that Plaintiff could sit for more
21 than two hours and stand for 30 minutes before needing to sit; that Plaintiff had moderate
22 limitations in his ability to pay attention or concentrate on tasks; and that Plaintiff could
23 work for 4-6 hours a day but would be off task at least 20% of the time during a typical
24 workday and be absent one to two days each month. (*Id.* at 1406-09.)

25 Meanwhile, in a September 2020 statement, Dr. Mendonca opined that Plaintiff still
26 experienced fatigue, neuropathy, and difficulty focusing as a side effect of his medications.
27 (*Id.* at 1501.) However, Dr. Mendonca indicated that Plaintiff experienced only mild
28 difficulties paying attention or concentrating. (*Id.* at 1504.) Dr. Mendonca also opined

1 that Plaintiff had moderate limitations providing consistent work effort and would miss
2 about two days of work per month. (*Id.* at 1504.)

3 3. The ALJ's Evaluation of Dr. Mendonca's Medical Opinions

4 The ALJ found Dr. Mendonca's opinions unpersuasive. (*Id.* at 18.) The ALJ's full
5 rationale was as follows:

6 The undersigned finds the opinions of Dr. Mendonca to be unpersuasive, as
7 they appear[] to contain inconsistencies. Particularly, Dr. Mendonca's
8 assessment that the claimant is limited to a sedentary exertional level and is
9 expected to be off task regular[ly], contrasts with his own exams that exhibit
10 normal findings, as well as the fact that the claimant admits no symptoms.
11 For instance, a follow up examination in August 2019 noted that he felt
12 better, denied chest pain, fevers or chills, he was eating better and his energy
level improved. He was also looking forward to a vacation. The exam
showed that he was in no acute distress, his neck was supple, his chest was
clear, his heart was regular, he had no abdominal tenderness, no edema, he
was alert and fully oriented and he had no palpable lymphadenopathy
(Exhibit 11F). These inconsistencies render[] Dr. Mendonca's opinion less
persuasive.

13 (*Id.*)

14 4. The Parties' Arguments

15 Plaintiff argues that the ALJ provided insufficient reasons for discrediting the
16 opinions of Dr. Mendonca. (Doc. 10 at 11-12.) More specifically, Plaintiff argues that the
17 ALJ's sole reason for discrediting Dr. Mendonca's opinions was that those opinions were
18 inconsistent with Dr. Mendonca's treatment notes, but the only cited support for this
19 assertion was "a *single* treatment note from August 2019" in which Plaintiff reported
20 feeling better and Dr. Mendonca noted that Plaintiff was not in acute distress. (*Id.*)
21 Plaintiff argues these observations "do[] not mean that [Plaintiff's] ability to perform full-
22 time work activity was restored," simply "represent[] a snapshot of how [Plaintiff] was in
23 that moment, during the examination, and [are] not inconsistent with Dr. Mendonca's
24 opinion as to how limited [Plaintiff] would be if he attempted to perform work activity on
25 a regular and continuing full-time basis." (*Id.*) Plaintiff also contends that his other
26 "treatment records . . . were replete with references to his ongoing symptoms of neuropathy
27 after his chemotherapy, issues with focus, and symptoms of fatigue." (*Id.*, citing AR 813-
28 946, 947-71, 972-1108, 1109-15, 1209-1383, 1461, and 1486-95.)

1 In response, the Commissioner defends the sufficiency of the ALJ's rationale for
2 discrediting Dr. Mendonca's opinions. (Doc. 11 at 10-13.) First, the Commissioner argues
3 that the ALJ properly discredited Dr. Mendonca's opinions on the ground that they were
4 "internally inconsistent with his own treatment notes." (*Id.* at 12.) In seeming response to
5 Plaintiff's argument that the August 2019 treatment note only represented a momentary
6 instance of improvement, the Commissioner contends that "[s]imilar findings were noted
7 in Dr. Mendonca's treatment records in November 2020, which the ALJ pointed out . . . in
8 his subjective complaint analysis." (*Id.*) Second, the Commissioner argues that the ALJ
9 was also entitled to discount Dr. Mendonca's opinions on the ground that they were
10 "inconsistent with the overall medical evidence." (*Id.* at 12-13.)

11 In reply, Plaintiff reiterates his earlier argument "that his report of 'feeling better'
12 in one isolated treatment note does not mean that his ability to perform full-time work
13 activity was restored. This note is not inconsistent with Dr. Mendonca's opinion as to how
14 limited [Plaintiff] would be if he attempted to perform work activity on a regular and
15 continuing full-time basis." (Doc. 12 at 5.) Plaintiff also reiterates his earlier argument
16 that his "treatment records . . . were replete with references to his ongoing symptoms of
17 neuropathy after his chemotherapy, issues with focus, and symptoms of fatigue." (*Id.* at
18 6.)

19 5. Analysis

20 As an initial matter, there is no merit to the Commissioner's contention that the ALJ
21 could have discredited Dr. Mendonca's opinions due to their inconsistency with the other
22 medical evidence in the record. It is not the Court's role to consider hypothetical reasons
23 why the ALJ might have rejected a particular piece of evidence or medical opinion—
24 instead, the Court must limit itself to considering the actual reasons provided by the ALJ
25 and evaluating their sufficiency. *Burrell v. Colvin*, 775 F.3d 1133, 1138 (9th Cir. 2014)
26 ("We are constrained to review the reasons the ALJ asserts."); *Bray v. Comm'r of Soc. Sec.*
27 *Admin.*, 554 F.3d 1219, 1225 (9th Cir. 2009) ("Long-standing principles of administrative
28 law require us to review the ALJ's decision based on the reasoning and factual findings

1 offered by the ALJ—not *post hoc* rationalizations that attempt to intuit what the adjudicator
2 may have been thinking.”). Here, the sole reason provided by the ALJ was inconsistency
3 with Dr. Mendonca’s own treatment notes.

4 Nevertheless, that reason was alone sufficient. Plaintiff does not dispute that an
5 ALJ may discredit a medical source’s opinions on the ground that they are inconsistent
6 with the medical source’s treatment notes. *Tristan v. Comm’r of Soc. Sec. Admin.*, 2022
7 WL 1707953, *3 (D. Ariz. 2022) (“Regardless of whether the ALJ’s finding of internal
8 inconsistency between the September 2017 notes and the November 2017 assessment is
9 characterized as a flaw of ‘consistency’ or ‘supportability,’ it serves as a permissible basis
10 for discounting Dr. Germain’s medical opinion under the new SSA regulations.”) (citation
11 omitted). Instead, Plaintiff argues that this principle is factually inapplicable here because
12 the August 2019 treatment note was aberrational and Dr. Mendonca’s other treatment notes
13 contained findings and observations that were consistent with Dr. Mendonca’s opinions.
14 This argument is unavailing because it was rational for the ALJ to conclude that the August
15 2019 treatment note was not aberrational—as discussed below, an array of Dr. Mendonca’s
16 treatment notes spanning a multi-year period reflect that Plaintiff was doing well with
17 treatment and would not be limited in the manner that Dr. Mendonca opined in the
18 assessment forms.

19 To set the stage, Plaintiff completed his fifth and final round of chemotherapy in
20 July 2019, which he “very well tolerated.” (AR at 1165.) Dr. Mendonca’s notes from
21 August 29, 2019, state that Plaintiff had a “complete response to treatment.” (*Id.*)
22 Additionally, Dr. Mendonca indicated that Plaintiff “overall feels better,” was eating better,
23 and had improved energy levels. (*Id.* at 1162.) Plaintiff also denied experiencing breath
24 palpitations. (*Id.*) Dr. Mendonca went over Plaintiff’s blood work (CBC, CMP, and LDH),
25 determined that “his counts had recovered,” and recommended follow-ups in three-month
26 intervals. (*Id.* at 1165.)

27 In November 2019, Dr. Mendonca wrote that Plaintiff “states that he has been
28 feeling better, energy level has continued to improve. He is doing a lot more activities, had

1 been traveling, spending time with family. He denies any fevers, chills, night sweats,
2 unintentional weight loss. Appetite is doing great. . . . He has residual issues with
3 neuropathy, taking gabapentin. No chest pain, palpitations, shortness of breath, cough, GI
4 complaints. . . . He feels well.” (*Id.* at 1461.)

5 In February 2020, Dr. Mendonca wrote that Plaintiff was “doing great without any
6 evidence of disease reoccurrence.” (*Id.* at 1458.) Plaintiff reported no shortness of breath
7 and was “overall feeling well,” despite mild neuropathy. (*Id.* at 1455.)

8 On May 13, 2020, Dr. Mendonca wrote that Plaintiff “reports feeling well” and had
9 “weaned himself off gabapentin.” (*Id.* at 1450). Dr. Mendonca also wrote that Plaintiff
10 “still has mild neuropathy affecting his toes, which he describes as intermittent, tolerable.”
11 (*Id.*) Dr. Mendonca also noted that Plaintiff’s blood work was stable with normal LDH
12 and expressed no concerns from that day’s evaluation. (*Id.* at 1453.)

13 In August 2020, Dr. Mendonca wrote that Plaintiff was “doing very well” and “does
14 not have any treatment related side effects other hand residual neuropathy, which is mild.”
15 (*Id.* at 1489.) Dr. Mendonca also noted that Plaintiff was off gabapentin and did not wish
16 to retry that medication. (*Id.*)

17 In November 2020, Dr. Mendonca wrote that Plaintiff was “feeling well” with “no
18 headaches, focal weakness.” (*Id.* at 1537.) Dr. Mendonca also wrote that Plaintiff’s energy
19 level was “doing well” and he experienced “overall improvement” to his neuropathy. (*Id.*
20 at 1537, 1540.)

21 As this summary makes clear, the ALJ could have rationally interpreted Dr.
22 Mendonca’s treatment notes between August 2019 and November 2020 as showing that
23 Plaintiff responded well to cancer treatment, continuously reported improvement, and
24 suffered only mild neuropathy. Although Plaintiff notes that some of the treatment and
25 other medical records contain indications that Plaintiff suffered from fatigue, neuropathy,
26 and concentration difficulties,² it is the ALJ’s duty to resolve conflicts in the evidence.

27 ² Plaintiff cites the following records: AR at 813-946 (hospital records primarily
28 pertaining to Plaintiff’s pneumonia, blood work, and gastrointestinal issues); AR at 947-
71 (Dr. Mendonca’s notes from June 2019 stating Plaintiff “had had some issues with
neuropathy and fatigue,” although Dr. Mendonca found Plaintiff alert and oriented); AR at

1 *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998). Because the ALJ’s determination
 2 represents a reasonable interpretation of the record, the Court will not disturb the decision.
 3 *Barnhart*, 278 F.3d at 954.

4 It was also rational for the ALJ to construe the observations in the treatment notes
 5 summarized above as inconsistent with, and not providing support for, Dr. Mendonca’s
 6 opined-to exertional limitations. Finally, although the ALJ only identified one particular
 7 treatment note (the August 2019 note) in the portion of the decision explaining why Dr.
 8 Mendonca’s opinions were unpersuasive, the ALJ made clear (by using the introducing
 9 phrase “For instance”) that this was not the only treatment note that was inconsistent with
 10 Dr. Mendonca’s opinions, but merely an exemplar, and cited other treatment notes
 11 containing similar observations in other portions of the decision.

12 Accordingly, the ALJ did not err in discrediting Dr. Mendonca’s opinions due to
 13 their inconsistency with Dr. Mendonca’s treatment notes.

14 B. Plaintiff’s Symptom Testimony

15 1. Standard Of Review

16 An ALJ must perform a two-step analysis to determine the credibility of a claimant’s
 17 pain and symptom testimony. *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035-36 (9th Cir.
 18 2007). First, the ALJ must determine whether the claimant has presented objective
 19 medical evidence of an underlying impairment “which could reasonably be expected to
 20 produce the pain or other symptoms alleged.” *Id.* at 1036. If so, and if there is no evidence
 21 of malingering, the ALJ may “reject the claimant’s testimony about the severity of [the]
 22 symptoms” only by “providing specific, clear, and convincing reasons for doing so.”
 23 *Brown-Hunter v. Colvin*, 806 F.3d 487, 488-89 (9th Cir. 2015).

24 ...

25 _____
 26 972-1108 (hospital records primarily related to the administration of Plaintiff’s
 27 chemotherapy injections and bloodwork); AR at 1109-15 (treatment note stating Plaintiff
 28 feels quite well except for a bit of neuropathy); AR at 1209-1383 (records from Plaintiff’s
 primary care provider); AR at 1461 (treatment note from November 2019 stating Plaintiff
 “has residual issues with neuropathy” for which he was taking gabapentin); and AR at
 1486-95 (treatment notes from August 2020 stating Plaintiff had “mild, residual
 neuropathy”).

1 2. Plaintiff's Symptom Testimony

2 At the hearing, Plaintiff explained that he stopped working after being diagnosed
3 with Burkitt's lymphoma. (AR at 34-35.) Plaintiff testified that he underwent
4 chemotherapy, which was successful in resolving the lymphoma, but he experienced
5 various "post treatment symptoms" afterward, including brain fog and difficulty following
6 directions. (*Id.*) For example, Plaintiff testified that his ability to "manipulate
7 spreadsheets" has worsened after chemotherapy. (*Id.* at 38-39.) Consequentially, Plaintiff
8 testified that he is no longer able to help his wife manage their finances. (*Id.*)

9 Plaintiff also reported lower stamina. (*Id.* at 35.) He testified that he attempts to
10 walk a mile a day but needs to stop to rest three-quarters of the way through due to shortness
11 of breath or weakness. (*Id.* at 35, 41.) Plaintiff also testified that he does not have difficulty
12 sitting or breathing (*id.* at 35-36) and no longer needs to use a walker. (*Id.* at 42.)

13 Plaintiff also testified to continuing issues with neuropathy. (*Id.* at 34, 43.) At the
14 hearing, he testified to feeling numbness on the bottoms of his feet as well as freezing or
15 burning sensations. (*Id.* at 43.) Plaintiff was prescribed gabapentin for these symptoms
16 but testified that it did not help. (*Id.*) Plaintiff testified that his oncologist said the
17 neuropathy was a byproduct of chemotherapy and would eventually go away. (*Id.*)
18 Plaintiff testified that his neuropathy has remained constant since he was first diagnosed.
19 (*Id.* at 44.)

20 When asked to describe his daily activities, Plaintiff stated that he watches television
21 8 to 10 hours a day, does household chores like vacuuming and sweeping, goes grocery
22 shopping, runs other errands, assembles jigsaw puzzles, attempts to walk a mile each day,
23 and uses his tablet to shop, check his email, and visit financial websites. (*Id.* at 36-41.) As
24 for the television viewing, Plaintiff clarified that he sometimes forgets what he watched
25 and might need to rewind it, although these occurrences are infrequent. (*Id.* at 41.)

26 3. The ALJ's Evaluation Of Plaintiff's Symptom Testimony

27 The ALJ held that Plaintiff's "statements concerning the intensity, persistence and
28 limiting effects of these symptoms are not entirely consistent for the reasons explained

1 throughout [the ALJ’s] decision.” (*Id.* at 17.) The ALJ then identified the following
2 reasons for rejecting Plaintiff’s symptom testimony. (*Id.* at 17–19.)

3 First, the ALJ stated that “there is nothing in the medical evidence suggesting that
4 [Plaintiff] receives treatment” for his impairments “other than medication.” (*Id.* at 17.) In
5 support, the ALJ cited treatment notes stating that Plaintiff tolerated chemotherapy well
6 except for some post-therapy neuropathy. (*Id.*). In a related vein, the ALJ identified
7 records suggesting that Plaintiff’s various conditions were “mild” or “improved” or
8 “essentially unremarkable.” (*Id.*) For example, the ALJ noted that, according to treatment
9 notes, Plaintiff completed chemotherapy in July 2019 and was “doing well” the following
10 month. (*Id.*) The ALJ found this evidence consistent with Dr. Mendonca’s statement that
11 Plaintiff’s condition was stable, though he still required monitoring. (*Id.*) Similarly, the
12 ALJ found that Plaintiff’s neuropathy was “only mild” and had improved by November
13 2020. (*Id.*) The ALJ also found that Plaintiff’s pancytopenia had improved and noted that
14 “despite his sciatica, [Plaintiff] was still able to ambulate without assistance.” (*Id.*) As for
15 Plaintiff’s hyperthyroidism, hyperlipidemia, and shingles, the ALJ found that Plaintiff did
16 not “experience complications from the above referenced impairments at a frequency and
17 severity consistent with severe impairments.” (*Id.*)

18 Second, the ALJ concluded that although Plaintiff’s activities of daily living
19 (“ADLs”) “illustrate some functional deficits, they are not to the level of severity related
20 by the [Plaintiff].” (*Id.* at 18.) The ALJ noted that despite Plaintiff’s impairments, he
21 “continues to engage in a somewhat normal level of daily activity and interaction.
22 Specifically, the claimant admitted activities of daily living including cooking, washing
23 dishes, completing yardwork, performing light household chores, going swimming,
24 shopping for groceries, walking a mile a day, and carrying/lifting heavy objects.” (*Id.*)

25 Third, the ALJ noted that throughout the medical records, the Plaintiff “is described
26 as well nourished, well developed, cooperative, alert, oriented, and in no acute distress.”
27 (*Id.*, citations omitted.) Thus, the ALJ concluded that Plaintiff was “more able-bodied than
28 he alleges.” (*Id.*)

1 4. The Parties' Arguments

2 Plaintiff challenges the sufficiency of the ALJ's reasons for discrediting his
3 symptom testimony. (Doc. 10 at 12-14.) Plaintiff essentially makes two arguments in
4 support of this challenge. First, Plaintiff argues that the walking-related activities he
5 described are not inconsistent with his claim of disability because he clarified that he often
6 has to rest partway through the walk and had to use a walker until October 2019. (*Id.* at
7 13.) Second, Plaintiff argues that the household chores he described are not inconsistent
8 with his claim of disability because he "has difficulty understanding and following
9 instructions and is not able to focus well enough to do simple spreadsheets for the family
10 finances, while spreadsheets used to be a significant part of his paid job." (*Id.*)

11 The Commissioner defends the sufficiency of the ALJ's rationale for discrediting
12 Plaintiff's symptom testimony. (Doc. 11 at 5-10.) First, the Commissioner argues that the
13 ALJ permissibly found a conflict between Plaintiff's ADLs and Plaintiff's claim of
14 disability because being able to "engage in activities such as cooking, washing dishes,
15 completing yardwork, performing light household chores, going swimming, shopping for
16 groceries, walking a mile a day, and carrying/lifting heavy objects . . . translate[s] into the
17 physical functions required to perform work, such as walking, standing, sitting, lifting,
18 pushing, pulling, reaching, carrying, or handling." (*Id.* at 8-9.) The Commissioner also
19 contends that Plaintiff's testimony regarding his ADLs was inconsistent with Plaintiff's
20 symptom testimony because "Plaintiff contends he is unable to remember directions" but
21 driving, using a tablet for online shopping, and using a tablet to check balances and
22 expenditures on financial accounts are all "activities that require the ability to remember
23 and follow directions and sustain focus." (*Id.* at 9.) Similarly, the Commissioner contends
24 that Plaintiff's clarifications regarding his walking limitations "have no merit" because
25 "Plaintiff can ambulate without assistance." (*Id.* at 9-10.) Finally, and separate from the
26 issue of ADLs, the Commissioner argues that the ALJ also permissibly discounted
27 Plaintiff's symptom testimony due to (1) inconsistency with the medical evidence and (2)
28 the effectiveness of treatment and/or Plaintiff's unexplained failure to seek treatment for

1 his symptoms. (*Id.* at 7-8.)

2 In reply, Plaintiff simply repeats his earlier argument that “the activities of daily
3 living cited by the ALJ are not inconsistent with [Plaintiff’s] statements that he is unable
4 to remember directions or sustain focus well enough to perform work activity.” (Doc. 12
5 at 7.)

6 5. Analysis

7 The Court finds no harmful error in the ALJ’s evaluation of Plaintiff’s symptom
8 testimony.

9 As an initial matter, one of the reasons the ALJ provided for discrediting Plaintiff’s
10 symptom testimony was that Plaintiff experienced improvement from treatment and
11 thereafter (and without explanation) stopped seeking treatment. This is, in general, a valid
12 reason under Ninth Circuit law for discrediting a claimant’s symptom testimony. *Larsen*
13 *v. Kijakazi*, 2022 WL 1537365, *1 (9th Cir. 2022) (“The ALJ provided specific, clear, and
14 convincing reasons to discount Larsen’s testimony because . . . his symptoms improved
15 with treatment [and] there was an unexplained absence of treatment for a portion of the
16 closed period”); *Molina v. Astrue*, 674 F.3d 1104, 1112 (9th Cir. 2012) (“[T]he ALJ
17 may consider . . . [an] unexplained or inadequately explained failure to seek treatment or
18 to follow a prescribed course of treatment”) (citations omitted); *Tommasetti v. Astrue*,
19 533 F.3d 1035, 1040 (9th Cir. 2008) (“The record reflects that Tommasetti responded
20 favorably to conservative treatment . . . [which] undermines Tommasetti’s reports
21 regarding the disabling nature of his pain.”); *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir.
22 1989) (“[A]n unexplained, or inadequately explained, failure to seek treatment or follow a
23 prescribed course of treatment . . . can cast doubt on the sincerity of the claimant’s pain
24 testimony.”). However, Plaintiff makes no effort to address this reason in his brief—all of
25 Plaintiff’s arguments are focused on the sufficiency of one of the ALJ’s other proffered
26 reasons (inconsistency with ADLs) for discrediting his testimony.

27 Similarly, another of the ALJ’s proffered reasons for discrediting Plaintiff’s
28 symptom testimony was that it was inconsistent with the medical evidence in the record.

1 It is permissible for an ALJ to rely on such inconsistency as one (albeit not the sole) basis
 2 for discounting symptom testimony. *Smartt v. Kijakazi*, 53 F.4th 489, 498 (9th Cir. 2022)
 3 (“Claimants like Smartt sometimes mischaracterize [Ninth Circuit law] as completely
 4 forbidding an ALJ from using inconsistent objective medical evidence in the record to
 5 discount subjective symptom testimony. That is a misreading of [Ninth Circuit law].
 6 When objective medical evidence in the record is inconsistent with the claimant’s
 7 subjective testimony, the ALJ may indeed weigh it as undercutting such testimony. We
 8 have upheld ALJ decisions that do just that in many cases.”); *Rollins v. Massanari*, 261
 9 F.3d 853, 856 (9th Cir. 2001) (“While subjective pain testimony cannot be rejected on the
 10 sole ground that it is not fully corroborated by objective medical evidence, the medical
 11 evidence is still a relevant factor in determining the severity of the claimant's pain and its
 12 disabling effects.”). However, by limiting all of his credibility-related arguments to the
 13 subject of ADLs, Plaintiff again makes no effort to address one of the bases for the ALJ’s
 14 ruling.³

15 Given these determinations, it is arguably unnecessary to decide whether the ALJ’s
 16 third proffered reason for discrediting Plaintiff’s symptom testimony—inconsistency with
 17 ADLs—was also supported by substantial evidence. *Molina*, 674 F.3d at 1115 (“[S]everal
 18 of our cases have held that an ALJ's error was harmless where the ALJ provided one or
 19 more invalid reasons for disbelieving a claimant’s testimony, but also provided valid
 20 reasons that were supported by the record.”); *Carmickle v. Comm’r, Soc. Sec. Admin.*, 533
 21 F.3d 1155, 1162-63 (9th Cir. 2008) (“Because we conclude that two of the ALJ’s reasons
 22 supporting his adverse credibility finding are invalid, we must determine whether the ALJ’s
 23 reliance on such reasons was harmless error. . . . Here, the ALJ’s decision finding

24 ³ The ALJ’s finding on this point was, at any rate, supported by substantial evidence.
 25 For example, although Plaintiff testified that his neuropathy “has not gotten any better or
 26 worse” and was instead “constant” (AR at 44), Dr. Mendonca wrote in November 2020
 27 that Plaintiff experienced “overall improvement” to his neuropathy. (*Id.* at 1537, 1540.)
 28 Similarly, although Plaintiff testified that he runs out of breath when attempting to walk
 one mile (*id.* at 35), Dr. Mendonca’s treatment notes from February 2020 state that Plaintiff
 denied shortness of breath. (*Id.* at 1455, 1461). The ALJ also noted that, despite Plaintiff’s
 assertion that his brain fog has affected his focus and concentration, Plaintiff did not receive
 a diagnosis or treatment for this alleged impairment. (*Id.* at 34-35.) Additionally,
 Plaintiff’s healthcare providers described him as “alert and oriented.” (*Id.* at 837, 985.)

Carmickle less than fully credible is valid, despite the errors identified above.”). Nevertheless, in an abundance of caution, the Court clarifies that that reason, too, was legally valid and supported by substantial evidence. *Cf. Burch v. Barnhart*, 400 F.3d 676, 680-81 (9th Cir. 2005) (“In considering Burch’s testimony regarding her daily living, the ALJ explained that her daily activities ‘suggest that she is quite functional. She is able to care for her own personal needs, cook, clean and shop. She interacts with her nephew and her boyfriend. She is able to manage her own finances and those of her nephew.’ Although the evidence of Burch’s daily activities may also admit of an interpretation more favorable to Burch, the ALJ’s interpretation was rational, and ‘[w]e must uphold the ALJ’s decision where the evidence is susceptible to more than one rational interpretation.’”) (citation omitted).

C. Step-Two Severity Characterization

1. Legal Standard

At step two of the sequential evaluation process, the ALJ must determine whether the claimant suffers from a “severe” impairment or combination of impairments. *Smolen v. Chater*, 80 F.3d 1273, 1290-91 (9th Cir. 1996). In general, “[t]he step-two inquiry is a de minimis screening device to dispose of meritless claims.” *Id.* at 1291. “[A]ny impairment or combination of impairments which significantly limits [a person’s] physical or mental ability to do basic work activities” is considered “severe.” 20 C.F.R. § 404.1520(c). “Basic work activities are ‘abilities and aptitudes necessary to do most jobs, including, for example, walking, standing, sitting, lifting, pushing, pulling, reaching, carrying or handling.’” *Smolen*, 80 F.3d at 1273 (citation omitted). “An impairment or combination of impairments may be found not severe *only if* the evidence establishes a slight abnormality that has no more than a minimal effect on an individual’s ability to work.” *Webb v. Barnhart*, 433 F.3d 683, 686 (9th Cir. 2005) (quotation marks omitted).

The step-two inquiry also calls for an evaluation of the duration of the impairment or impairments. “Unless [the] impairment is expected to result in death, it must have lasted or must be expected to last for a continuous period of at least 12 months.” 20 C.F.R.

1 § 404.1509.

2 In determining the severity of the impairments, the ALJ considers the claimant's
3 testimony, treatment notes, imaging, reports of daily activities, opinion evidence, and any
4 other statements or observations in the record. 20 C.F.R. § 404.1529(a).

5 2. The ALJ's Step-Two Severity Evaluation

6 The ALJ's step-two severity analysis was largely driven by the ALJ's decision to
7 discredit Plaintiff's symptom testimony and Dr. Mendonca's opinions for the reasons
8 stated above. In contrast, the ALJ deemed "persuasive" the opinions of the two state
9 agency consultants, both of whom "opined that the claimant's impairments are nonsevere."
10 (AR at 18-19.)

11 The ALJ also offered several observations regarding the chronology of Plaintiff's
12 medical treatment. More specifically, the ALJ noted that Plaintiff was diagnosed with
13 Burkitt's lymphoma in December 2018 and began chemotherapy at that time; completed
14 chemotherapy by July 2019; was described as "doing well" and posing "no concerns" in
15 August 2019; and experienced only "mild" neuropathy" in the period that followed, which
16 was treated by gabapentin (which Plaintiff stopped taking in November 2020). (*Id.* at 17.)

17 3. The Parties' Arguments

18 Plaintiff's essential argument is that the ALJ's non-severity finding at step two is
19 erroneous because it conflicts with Dr. Mendonca's opinions and his symptom testimony,
20 both of establish that his "lymphoma and the residual effects of chemotherapy do continue
21 to result in significant limitations in [his] ability to perform basic work activities and are
22 therefore severe impairments." (Doc. 10 at 5-9.)

23 In response, the Commissioner argues that the ALJ properly discredited Dr.
24 Mendonca's opinions and Plaintiff's symptom testimony. (Doc. 11 at 5.) The
25 Commissioner also contends that "Plaintiff failed to demonstrate that his impairments met
26 the 12-month durational requirement at step two." (*Id.*)

27 In reply, Plaintiff argues that the ALJ did not rely on the step-two durational
28 requirement of 12 months and that "[t]he ALJ's rationale was that the impairments did not

1 result in significant work-related limitations.” (Doc. 12 at 2.) Plaintiff then reiterates his
2 earlier argument that both Dr. Mendonca’s opinions and his symptom testimony show that
3 any such severity determination was erroneous. (*Id.* at 2-4.)

4 4. Analysis

5 Plaintiff has failed to establish that the ALJ erred when making the step-two finding
6 of non-severity.

7 First, and most important, all of Plaintiff’s arguments on this issue seem to be
8 derivative of his challenges to the ALJ’s evaluation of Dr. Mendonca’s opinions and his
9 symptom testimony. But for the reasons discussed in Parts IV.A and IV.B above, Plaintiff
10 has failed to establish any harmful error as to those issues. Nor does Plaintiff challenge
11 the ALJ’s decision to credit the opinions of the two state agency consultants, both of whom
12 opined that Plaintiff’s impairments were non-severe within the meaning of the Act. Thus,
13 on this record, substantial evidence supports the ALJ’s step-two finding of non-severity.

14 Second, and alternatively, it is also rational to construe the ALJ’s decision as a
15 determination that, even if Plaintiff’s impairments were severe for a period of time, they
16 did not remain severe for the minimum period of 12 months necessary to satisfy the step-
17 two durational requirement. Admittedly, the ALJ did not phrase the conclusion in these
18 precise terms, but the ALJ made a point of emphasizing the chronology of Plaintiff’s
19 treatment (under which chemotherapy began in December 2018 and Plaintiff’s associated
20 symptoms became mild and under control by August 2019) and noted in the heading of the
21 step-two analysis that Plaintiff did “not have an impairment or combination of impairments
22 that has significantly limited (or is expected to significantly limit) the ability to perform
23 basic work-related activities *for 12 consecutive months.*” (AR at 17, emphasis added.) It
24 is unfortunate that the ALJ was not clearer on this point, but “[w]here the evidence is
25 susceptible to more than one rational interpretation, one of which supports the ALJ’s
26 decision, the ALJ’s conclusion must be upheld.” *Thomas*, 278 F.3d at 954. Also, as
27 discussed above, this is merely an alternative ground for affirming the ALJ’s step-two
28 determination. The other ground does not turn on the durational requirement.

1 Accordingly,

2 **IT IS ORDERED** that the decision of the ALJ is **affirmed**. The Clerk shall enter
3 judgment accordingly and terminate this action.

4 Dated this 26th day of June, 2023.

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8 Dominic W. Lanza
9 United States District Judge
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